

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT G. GLINSKI,

Plaintiff-Appellant,

v

JOHN JAMES WOLF and FABIAN SUAREZ,

Defendants-Appellees.

UNPUBLISHED

January 5, 1999

No. 201478

Wayne Circuit Court

LC No. 96-640048 NO

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

This case arises out of an investigation that defendants, John Wolf and Fabian Suarez, undertook of plaintiff. Defendants are detective troopers with the Michigan State Police Department assigned to the Diversion Investigation Unit which investigates medical professionals for, among other things, unlawfully prescribing controlled substances and health care fraud. In March of 1994, defendants began investigating plaintiff, a doctor who practices in Garden City, to determine if he was overprescribing medication. Plaintiff was brought to defendants' attention by Detective Grote, a Van Buren Township police officer. Sometime prior to March of 1994, Detective Grote arrested an individual for reckless driving, fleeing, eluding, and resisting a police officer and possession of marijuana. When Detective Grote searched the individual's property, he found a personal telephone book with plaintiff's name, office phone number, home phone number and pager number listed. Detective Grote also found several pharmacy addresses and phone numbers in the address book. Detective Grote found this peculiar and reported it to the Michigan State Police Diversion Investigation Unit.

Acting on this information, defendant Wolf visited plaintiff's office eight times between March of 1994 and August of 1994, posing as a patient. Defendant Wolf was equipped with a minicassette tape recorder and a transmitter so that a surveillance team could monitor his visits. On his initial visit, defendant Wolf complained of a sore left shoulder. Plaintiff asked defendant Wolf to lift his injured arm

until it hurt. Plaintiff ordered an x-ray and a cortisone injection but defendant Wolf declined both and, instead, asked for something for the pain. After the initial visit, plaintiff did not conduct any examinations but continued to prescribe Tylenol #3. During a later visit, defendant Wolf complained of sleeping problems and plaintiff prescribed Dalmane without examination. Defendant Wolf received 1,134 Tylenol #3, a schedule III controlled substance, and 510 Dalmane, a schedule IV controlled substance.

Defendant Suarez visited plaintiff's office nine times between March of 1994 and January of 1995 and received 1,920 Tylenol #3 and 840 Dalmane. During defendant Suarez's initial visit, plaintiff conducted a minimal examination of defendant Suarez's complaint of right elbow pain and then prescribed Tylenol #3. Plaintiff conducted no other physical examinations on defendant Suarez but continued prescribing Tylenol #3. As did defendant Wolf, defendant Suarez later complained of sleeping problems and plaintiff prescribed Dalmane without examination.

Defendant Wolf met with the Wayne County Prosecutor in January of 1995, for a review of defendants' investigation of plaintiff. In March of 1995, defendant Wolf presented an affidavit in support of a search warrant to search plaintiff's office, which had been reviewed by a prosecutor, to District Judge Richard L. Hammer. Judge Hammer found that probable cause existed and issued a search warrant. Judge Hammer also issued a warrant for plaintiff's arrest.

In May of 1995, plaintiff's preliminary examination was held in front of Judge Hammer. Judge Hammer completely dismissed the warrant and complaint against plaintiff. Judge Hammer found that plaintiff was acting within the scope of his practice as an osteopathic physician and that there was no evidence that plaintiff prescribed the drugs in bad faith or with criminal intent. Judge Hammer opined that plaintiff's conduct may have fallen below the minimum standards of professional conduct, but that the evidence did not establish bad faith or criminal intent.

Plaintiff filed this suit in September of 1996, alleging claims of gross negligence, false arrest and imprisonment and malicious prosecution. In November of 1996, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that plaintiff's gross negligence claim was essentially a "negligent investigation" theory that must fail because defendants' did not owe a duty to plaintiff. In addition, defendants argued that a finding of gross negligence was impossible given the undisputed facts of the case. Defendants argued that they conducted a thorough investigation of plaintiff and turned the information over to the prosecutor's office. In support of this argument, defendants attached a report of the nineteen undercover visits they made to plaintiff's office.

Defendants further argued that plaintiff's false arrest and imprisonment claim must also fail because defendants had probable cause to arrest and detain plaintiff. Defendants asserted that they had investigated plaintiff and given all the information to the prosecutor's office which authorized an arrest warrant. The affidavit for plaintiff's arrest warrant, defendants contended, contained all of the facts of the case. Therefore, defendants argued, plaintiff's claim must fail because plaintiff's arrest was legal.

Finally, defendants argued that plaintiff's malicious prosecution claim must fail because defendants did not initiate the prosecution of plaintiff. Defendants offered the affidavit that was filed in support of the request for plaintiff's arrest warrant, arguing that the affidavit contained complete and

accurate information. The affidavit was reviewed by the district court judge who issued the warrants. Thus, defendants argued that plaintiff could not pursue his claims against them.

In response, plaintiff asserted that defendants never had probable cause to arrest, detain or prosecute him. Plaintiff offered the preliminary examination transcript in which Judge Hammer dismissed all the charges against plaintiff because the judge found that there was no probable cause to believe that plaintiff committed a crime. Plaintiff argued that because no probable cause existed to arrest him, defendants acted in a grossly negligent fashion when they pursued a criminal prosecution against plaintiff.

Plaintiff also asserted that he should prevail on his false arrest and imprisonment claim because defendants lacked probable cause to arrest and detain him. Moreover, plaintiff argued defendants failed to disclose exculpatory information in the affidavit that they presented to Judge Hammer which, if the information had been disclosed, would have led the judge to deny the request for an arrest warrant for plaintiff.

Finally, plaintiff argued that he established a prima facie case of malicious prosecution. Plaintiff contended that defendants conducted a year long undercover investigation of plaintiff, defendant Wolf signed the affidavit in support of his request for the search warrant and defendants willfully concealed exculpatory information from that affidavit. Further, plaintiff argued that malice could be inferred from the total lack of probable cause that plaintiff had committed a crime. Accordingly, plaintiff argued that defendants' motion for summary disposition should be denied.

In January of 1997, the trial court held a hearing on defendants' motion. The trial court dismissed plaintiff's gross negligence claim, stating that defendants did not have a duty to plaintiff because a special relationship did not exist between plaintiff and defendants. The trial court held that defendants were acting within the scope of their authority and that plaintiff had not demonstrated that defendants had engaged in conduct so reckless as to demonstrate a substantial lack of concern whether an injury results. The trial court also dismissed plaintiff's false arrest and imprisonment claims, holding that a false arrest claim cannot lie against an officer who merely executes a warrant. The trial court found that defendants were acting within the scope of their authority when they conducted their investigation of plaintiff and executed the warrant. Finally, the trial court ruled that plaintiff had presented no evidence of any malicious intent on the part of defendants. Accordingly, the trial court granted defendants' motion for summary disposition and dismissed all of plaintiff's claims against defendants. Plaintiff then appealed by right.

II. Standard Of Review

We review a trial court's decision to grant summary disposition de novo. *Terry v Detroit*, 226 Mich App 418, 423; 573 NW2d 348 (1997). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 362; 575 NW2d 290 (1998). Summary disposition is proper only if the trial court is satisfied that no factual development could justify recovery by the nonmoving party. *Id.*

III. Summary Disposition

A. Introduction

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition with regard to his gross negligence, false arrest and imprisonment, and malicious prosecution claims.

B. Governmental Immunity

Plaintiff argues that defendants cannot rely on governmental immunity because they acted in a grossly negligent fashion in arresting and detaining plaintiff without probable cause. We disagree. Plaintiff relies on the dismissal of the charges against him after the preliminary examination as conclusive proof that defendants lacked probable cause to arrest him. However, plaintiff's discharge at the preliminary examination, alone, is not evidence of lack of probable cause. *Koski v Vohs*, 426 Mich 424, 432 n 5; 395 NW2d 226 (1986).

Defendants had probable cause to arrest plaintiff. The facts and circumstances within defendants' knowledge at the time of plaintiff's arrest were sufficient for a prudent person to believe that plaintiff had prescribed controlled substances in bad faith without a legitimate or professionally recognized therapeutic or scientific purpose in violation of MCL 333.7401(1); MSA 14.15(7401)(1). See *Tope v Howe*, 179 Mich App 91, 102; 445 NW2d 452 (1989). Defendants, posing as patients, conducted an undercover investigation of plaintiff from March of 1994 through January of 1995. As we have outlined above, defendants initiated the investigation upon receiving the information that plaintiff's name, office, home and pager numbers, along with several pharmacy addresses and phone numbers, were found on an individual arrested for fleeing, eluding, and resisting a police officer and possession of marijuana. Defendant Wolf visited plaintiff's office posing as a patient eight times between March of 1994 and August of 1994 and received 1,134 Tylenol #3, a schedule III controlled substance, and 510 Dalmane, a schedule IV controlled substance. Defendant Suarez visited plaintiff's office nine times between March of 1994 and January of 1995, and received 1,920 Tylenol #3, and 840 Dalmane. Plaintiff spent an average of less than two minutes in the examination room with defendants during their visits.

During defendants' investigation, defendant Wolf met with Detective White who indicated that the Western Wayne Narcotics team had executed a search warrant on a suspect's house in Garden City and that the team found several prescription bottles with plaintiff listed as the prescribing physician. In June of 1994, defendant Wolf was in plaintiff's waiting room and approached another patient and asked what he was getting from plaintiff and if he would be interested in selling the pills to defendant Wolf. The patient indicated that he was interested and later that day sold fifty valium and ten Tylenol #3 to defendant Wolf.

Because defendants had probable cause to arrest and detain plaintiff, they were acting within the scope of their authority. MCL 691.1407(2)(a); MSA 3.996(107)(2)(a); *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995); *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994). Defendants were also discharging a governmental function when they arrested plaintiff since "[t]here are few functions more clearly governmental in nature than the arrest, detention, and prosecution of persons suspected of having committed a crime and the decisions involved in determining

which suspects should be prosecuted and which should be released.” *Payton, supra* at 392. Moreover, defendants’ conduct in arresting plaintiff was reasonable and did not constitute conduct “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Because defendants were acting within the scope of their authority, were engaged in the discharge of a governmental function and their actions did not amount to gross negligence, they were protected from suit by governmental immunity. *Bell, supra* at 525. Accordingly, we hold that summary disposition was properly granted.

C. False Arrest And Imprisonment

Plaintiff argues that, because defendants lacked probable cause to arrest him, defendants were liable for false arrest and imprisonment. We again disagree. A false arrest is one that is illegal or unjustified, i.e., an arrest that is not based on probable cause. *Lewis v Farmer Jack Div, Inc*, 415 Mich 212, 218; 327 NW2d 893 (1982); *Tope, supra* at 105. If the arrest is legal, there has not been a false arrest. *Id.* As discussed, *supra*, defendants had probable cause to arrest plaintiff. Therefore, we hold that summary disposition was proper with regard to plaintiff’s false arrest and imprisonment claim.

D. Malicious Prosecution

Plaintiff argues that summary disposition was improper because he established a prima facie case of malicious prosecution. We disagree once more. In order to state a prima facie case of malicious prosecution, the plaintiff must prove (1) that the defendant has initiated a criminal prosecution against him; (2) that the criminal proceedings terminated in his favor, (3) that the defendant who instituted or maintained the prosecution lacked probable cause for his actions; and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing an offender to justice. *Matthews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 377-378; 572 NW2d 603 (1998).

It is undisputed that the proceedings against plaintiff were terminated in his favor when Judge Hammer dismissed the warrant and charges against plaintiff after the preliminary examination. Plaintiff argues that the only reason a warrant was issued based on a finding of probable cause was that defendant Wolf failed to disclose several exculpatory facts in the affidavit. An officer who *merely* executes a warrant that is valid on its face is protected from liability. *Flones v Dalman*, 199 Mich App 396, 404; 502 NW2d 725 (1993). “Immunity from liability for an arrest made pursuant to a warrant is grounded on the existence of probable cause, evidenced by a warrant.” *Id.* “Failure to include all exculpatory facts is not adequate to sustain a suit for malicious prosecution.” *Payton, supra* at 395. What is required is evidence that would give rise to the inference that the defendant knowingly included false facts in his affidavit, without which the prosecutor could not have concluded there was probable cause. *Id.*; *King v Arbic*, 159 Mich App 452, 466; 406 NW2d 852 (1987).

Plaintiff has offered no evidence that defendant Wolf knowingly included false facts in his affidavit. In addition, the information that plaintiff has labeled as exculpatory would not have negated Judge Hammer’s finding of probable cause. Because defendants had probable cause to arrest plaintiff

and plaintiff has not produced any evidence that defendants knowingly included false facts in the affidavit or even excluded exculpatory facts, we hold that the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ William C. Whitbeck